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In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF TEXAS INVESTMENT BANK, N.A., PETITIONER

v.

ROCKLEIGH S. DAWSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether federal law establishes the standard for determining when the adverse domination doctrine tolls the statute of limitations on claims brought against allegedly wrongdoing officials of a failed federally insured financial institution by the FDIC as receiver for the institution.

PARTIES TO THE PROCEEDING

In addition to the respondent named in the caption, Kirk K. Weaver and Michael D. Maloy also are respondents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	6
Conclusion	12
Appendix A	1a
Appendix B	22a
Appendix C	28a
Appendix D	30a

TABLE OF AUTHORITIES

Cases:

Farmers & Merchants National Bank v. *Bryan*, 902 F.2d 1520 (10th Cir. 1990)	4, 9, 10
FDIC v. *Appling*, 992 F.2d 1109 (10th Cir. 1993)	10
FDIC v. *Cocke*, 7 F.3d 396 (4th Cir. 1993)	11
O'Melveny & Myers v. *FDIC*, cert. granted, 114 S. Ct. 543 (1993)	12
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)	7

Statute:

12 U.S.C. 1821(d)(14) (Supp. IV 1992)	3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Deposit Insurance Corporation, as Receiver of Texas Investment Bank, N.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 4 F.3d 1303. The orders of the district court (App., *infra*, 22a-27a, 28a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1993. A petition for rehearing was denied

on December 21, 1993. App., *infra*, 30a-31a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the activities of the three respondents—Dawson, Weaver, and Maloy—in the management of Texas Investment Bank, N.A. Each of the respondents served as an officer or director of that institution for all or a portion of the period from 1982 until 1987. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver for the institution in May, 1987. See App., *infra*, 2a-3a, 8a.

2. On April 2, 1990, the FDIC filed this suit in its capacity as receiver. The complaint alleges that respondents acted negligently, breached their fiduciary duties to the institution, and violated their oaths as directors in the course of their conduct at the institution. Specifically, the complaint alleges that from 1982 to 1984 the institution made 82 unsafe and unsound loans, which constituted unsafe and unsound banking practices that the board of directors of the bank should have prevented. See App., *infra*, 3a-4a.[1]

a. Respondents Weaver and Dawson moved for dismissal of the complaint, arguing that the complaint was barred by the applicable statute of limitations. On December 10, 1991, the district court granted

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[1] The complaint also named Wayne C. Desselle as a defendant. When Desselle did not respond to the complaint, the district court entered a default judgment in favor of the FDIC against him. See App., *infra*, 2a, 4a. Because Desselle did not appeal that judgment, Desselle is not a party to the proceedings in this Court.

their motions. App., *infra*, 22a-27a. The court concluded that the causes of action set forth in the complaint initially accrued no later than October 5, 1984, the date the last challenged loan was made. *Id.* at 25a-26a. The court held that those claims were governed by the two-year statute of limitations applicable to tort claims under Texas law. *Id.* at 24a-25a. Under that reasoning, absent tolling, the statute of limitations would have expired on October 5, 1986, before the FDIC became receiver of the institution. *Id.* at 26a.[2]

The court then rejected the FDIC's contention that the statute of limitations had been tolled before the receivership through operation of the adverse domination doctrine. The court stated that the adverse domination doctrine applies only "when the allegedly culpable directors constitute a majority of the board of directors" and held that the doctrine could not apply in this case because the FDIC had not brought suit against a majority of the board of directors. App., *infra*, 26a. Accordingly, the court concluded that the FDIC's complaint should be dismissed as to respondents Dawson and Weaver. *Id.* at 26a-27a.

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[2] Although the district court did not explain its reasoning, the court apparently followed the Fifth Circuit's rule that, notwithstanding the apparently plain language of 12 U.S.C. 1821(d)(14) (Supp. IV 1992) (which provides that the statute of limitations on a claim brought by the FDIC as receiver does not begin to run before the FDIC is appointed receiver), the FDIC is not entitled to pursue claims for which the applicable limitations period already had expired before the FDIC was appointed receiver. See App., *infra*, 5a-7a (discussion of that rule by the court of appeals).

b. Respondent Maloy subsequently filed a motion to dismiss, seeking dismissal on the same grounds as Weaver and Dawson. The district court granted that motion on May 4, 1992. App., *infra*, 28a-29a. The court explained that the FDIC "has asserted the same claims against Maloy that were asserted against Dawson and Weaver" and reasoned that its dismissal of the claims against Dawson and Weaver mandated dismissal of the claims against Maloy. *Id.* at 29a.

3. The court of appeals affirmed. App., *infra*, 1a-21a. The principal issue addressed in its opinion was whether the adverse domination doctrine tolled the statute of limitations. *Id.* at 8a-21a.

a. In resolving that issue, the court focused on an "important preliminary issue," namely, "whether state or federal law governs the FDIC's assertion of the adverse domination doctrine." App., *infra*, 10a. The court acknowledged that "[t]he Tenth Circuit has squarely held in a similar case that the question of whether the state's statute of limitations was equitably tolled was a question of federal law." *Ibid.* (citing *Farmers & Merchants National Bank* v. *Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990)). The Fifth Circuit, however, specifically declined "to follow the approach of the *Bryan* court" and held, instead, "that the Texas law of adverse domination applies." Pet. App. 12a.

b. The court then turned to the question of whether the Texas version of the adverse domination doctrine would toll the statute of limitations in this case. App., *infra*, 12a-21a. The court held that Texas follows the "majority" rule, under which tolling occurs if the plaintiff shows "that a majority of the

board members were wrongdoers," rather than the stricter "complete domination" rule, under which the plaintiff must show "full, complete and exclusive control in the directors or officers charged." *Id.* at 13a-15a. The court also concluded that, as applied in *Texas*, the "majority" rule does not require a suit against a majority of the directors, as long as the plaintiff alleges misconduct by a majority. *Id.* at 15a-17a.

Finally, the court considered the level of culpability that the plaintiff must show under Texas law on the part of the malfeasant directors for tolling to occur. App., *infra*, 17a-21a. The court acknowledged that most federal courts applying the adverse domination doctrine in cases involving the FDIC and the Resolution Trust Corporation (RTC) generally have concluded that "negligence alone" is sufficient for tolling to occur, and stated that "[u]nder [that] approach, adverse domination tolling could be available to the FDIC in the instant case." *Id.* at 19a. The court rejected that approach, however, relying on its understanding of the general inclinations of the Texas Supreme Court in interpreting statutes of limitation (*id.* at 18a-19a),[3] as well as similar decisions of state courts in California (*id.* at 20a). On that basis, the court concluded that the adverse domination doctrine "must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent." *Ibid.* Because the court concluded that the FDIC's submissions in the district court "showed only negli-

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[3] The court saw its role as being "to predict how a Texas court would decide this issue." App., *infra*, 18a.

gence on the part of the majority of [the institution]'s board of directors," it affirmed the district court's entry of judgment in favor of respondents. *Id.* at 21a.[4]

4. The court of appeals denied the FDIC's petition for rehearing and suggestion of rehearing en banc without dissent. App., *infra*, 30a-31a.

REASONS FOR GRANTING THE PETITION

As the Fifth Circuit's opinion explicitly acknowledges, its decision that state law governs the tolling of the statute of limitations in this case squarely conflicts with the Tenth Circuit's resolution of the same question. The issue has very substantial financial importance for the federal government. Accordingly, the decision warrants review by this Court. As we explain below, however, it is possible that this Court's disposition of *O'Melveny & Myers* v. *FDIC*, cert. granted, No. 93-489 (Nov. 29, 1993) (set for argument March 21, 1994), will shed light on the proper analysis to be used in deciding this case. Accordingly, we suggest that it would be appropriate to hold this petition pending this Court's disposition of *O'Melveny*.

1. The decision of the court of appeals rests on the premise that there is "no justification for applying federal equitable tolling principles" in this case, because the limitations period initially applicable to the causes of action presented in this case was prescribed by a state statute. App., *infra*, 12a. That premise ignores the strong federal interest in adequately

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[4] The court of appeals treated the district court's rulings on the motions to dismiss as grants of summary judgment, because the district court relied on matters outside the pleadings in disposing of those motions. App., *infra*, 4a-5a.

preserving claims against malfeasant officers and directors of financially insured depository institutions.

In *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), this Court explained that, in many circumstances, "federal law governs questions involving the rights of the United States arising under nationwide federal programs." *Id.* at 726. The *Kimbell Foods* opinion articulated three considerations that determine "[w]hether to adopt state law or to fashion a nationwide federal rule." *Id.* at 728. First, "federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." *Ibid.* (internal quotation marks omitted). Second, "[a]part from considerations of uniformity," a court should "fashion special [federal] rules" where "application of state law would frustrate specific objectives of the federal programs." *Ibid.* Finally, the decision whether to fashion a federal rule also should take into account "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id.* at 729.

As we explain in our brief on the merits in *O'Melveny*, at 28-34,[5] the rule of *Kimbell Foods* frequently calls for the articulation of a uniform federal rule where the FDIC as receiver pursues claims on behalf of the creditors of federally insured financial institutions. That federal rule must take into account the unique role of the FDIC as receiver, including the FDIC's inability to bring such suits before the

[5] We have provided counsel for respondents a copy of our brief on the merits in *O'Melveny*.

institution fails, as well as the FDIC's role as insurer of depositor's accounts, which makes it the largest creditor of failed financial institutions. Application of a uniform federal rule in such cases does not unfairly undermine reasonable expectations, because wrongdoing officers and directors of financially insured institutions cannot reasonably assume that the wrongful or negligent failure of their corporate boards promptly to bring suit for their wrongful activity should immunize them from liability for that activity.

The issue here is closely related to the issue before the Court in *O'Melveny*. As the court of appeals acknowledged, state courts have had relatively few opportunities to consider the adverse domination doctrine in recent years. See App., *infra*, 19a. It makes little sense for federal courts to attempt to guess, on a state-by-state basis, how state courts would resolve such questions if they were to be presented to them. See Gov't *O'Melveny* Br. at 29. On the other hand, there is a strong federal interest in the development of a uniform federal adverse domination doctrine that takes into account the special responsibilities of the officers and directors of federally insured institutions, the role of the FDIC as receiver and guardian of the federal insurance fund, as well as the legitimate interests of individuals and the judicial system in protection from truly stale causes of action. Also, here, as in *O'Melveny*, there is no basis for serious concern that application of a uniform federal rule will upset reasonable commercial expectations; respondents can express no surprise at the notion that federal law would govern the time within which the FDIC can bring suit to recover

damages inflicted on the federally insured and pervasively regulated institution by which they were employed. See Gov't *O'Melveny* Br. at 33-34.

2. The adverse domination rule applied by the court of appeals differs significantly from the appropriate federal standard. The court of appeals acknowledged that federal courts applying the adverse domination doctrine in cases involving the FDIC and the RTC generally have concluded that negligence on the part of a majority of the directors is sufficient to justify invocation of the doctrine when insiders have acted fraudulently. App., *infra*, 19a. The only federal court of appeals that has considered what the federal rule should be has reached the same result. See *Bryan*, 902 F.2d at 1523 (FDIC made out its case by showing that the directors "knew or should have known the facts giving rise to possible liability").

The contrary conclusion of the court of appeals, reached through application of Texas law—that the adverse domination doctrine "must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent," App., *infra*, 20a—rested on the Fifth Circuit's understanding of the general inclinations of the Texas courts. See, *e.g.*, *id.* at 18a-19a (discussing Texas Supreme Court cases regarding the general policies of statutes of limitations). That conclusion does not give sufficient weight to the practicalities that have led most courts considering the question to conclude that negligence on the part of a majority of the directors is sufficient. The adverse domination doctrine exists because of the serious vulnerability of corporations harmed by wrongdoing corporate insiders. In such circum-

stances, it is inequitable to allow the malfeasant insiders to rely on the statute of limitations unless the corporation had a fair opportunity to bring suit against the wrongdoers during the applicable limitations period. But a fair opportunity to bring suit is lacking where a majority of the directors were negligent, as well as where they were active participants in the wrongdoing. When a majority of the directors improperly do not act to remedy the wrongdoing of other directors or insiders, it makes no difference to the institution whether the reason is that the directors willfully covered up or collaborated in the wrongdoing, or simply that they acted negligently in failing to discover or act upon it. In either case, the wrongdoing of the insiders—absent application of the adverse domination doctrine—would deprive the institution of a remedy and allow the wrongdoers to escape liability for the harm they caused. The federal adverse domination doctrine employed by the Tenth Circuit prevents that unfair result.

3. The court of appeals acknowledged that its decision conflicted with a decision of the Tenth Circuit that—to use the Fifth Circuit's words—"squarely held in a similar case that the question of whether the state's statute of limitations was equitably tolled was a question of federal law." App., *infra*, 10a (citing *Farmers & Merchants National Bank* v. *Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990)). *Bryan* remains good law in the Tenth Circuit. See *FDIC* v. *Appling*, 992 F.2d 1109, 1115-1116 (10th Cir. 1993) (following *Bryan*). Because the court of appeals denied the FDIC's suggestion of rehearing en banc in this case (App., *infra*, 30a-31a) there is, in addition, no

reason to believe that the courts of appeals will resolve the existing conflict without intervention by this Court.

The question presented by this case is, furthermore, of great financial importance to the United States. The FDIC has advised us that the decision in this case, together with the similar decision of the Fourth Circuit in *FDIC* v. *Cocke*, 7 F.3d 396 (1993),[6] calls into question more than $500 million of claims the FDIC currently has pending nationwide, involving at least 49 failed institutions. Similarly, the RTC has advised us that it has at least 22 pending actions, involving claims of more than $1.3 billion in the Fourth and Fifth Circuits alone, which would be called into question by the decisions in this case and *Cocke*.

4. In our view, it would be appropriate for the Court to hold the petition in this case pending its disposition of *O'Melveny*. For the reasons outlined above, the Court's decision in *O'Melveny* may shed light on the proper resolution of the issues in this case. It thus might be appropriate after the *O'Melveny* decision to grant the petition in this case, vacate the decision of the court of appeals, and remand the case for further consideration in light of *O'Melveny*. Alternatively, if the disposition of *O'Melveny* does not make that course appropriate and does not resolve the circuit conflict, we believe that

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[6] Today we are filing a petition for a writ of certiorari seeking review of the decision of the Fourth Circuit in *Cocke*. As we explain in that petition, we believe that the decision in this case presents a more suitable vehicle for plenary review of the question presented by these cases. We have provided a copy of the *Cocke* petition to counsel for respondents.

the Court should grant the petition in this case and set the case for oral argument.

CONCLUSION

The petition for a writ of certiorari should be held, pending disposition of *O'Melveny & Myers* v. *FDIC*, cert. granted, 114 S. Ct. 543 (1993) (No. 93-489) (set for argument March 21, 1994), and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2460

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK,
PLAINTIFF-APPELLANT,

VS.

ROCKLEIGH S. DAWSON, JR., ET AL.
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS

Oct. 21, 1993

Before: REAVLEY, KING, and GARWOOD, Circuit Judges.

KING, Circuit Judge:

The Federal Deposit Insurance Corporation as receiver sued certain directors and officers of a failed bank, alleging that the bank had incurred substantial losses due to their actions and omissions. The district court granted summary judgment in favor of the defendants Rockleigh S. Dawson, Jr., Kirk K.

Weaver, and Michael D. Maloy, and the FDIC appeals. We affirm.

I.

The defendants in this action were all directors or employees of Texas Investment Bank, N.A. ("TIB"), a federally insured banking institution organized, existing, and operating under the laws of the United States. On May 21, 1987, the United States Office of the Comptroller of the Currency ("OCC") declared TIB to be insolvent. The OCC ordered TIB closed and appointed the FDIC as receiver. As part of its effort to recover on losses to the federal deposit insurance fund caused by the failure of TIB, the FDIC sued to recover damages allegedly resulting from the negligent discharge of duties by defendants Rockleigh S. Dawson, Jr. ("Dawson"), Kirk R. Weaver ("Weaver"), Michael D. Maloy ("Maloy"), and Wayne C. Desselle ("Desselle") as officers or directors of TIB.

Defendant Dawson became president and chief executive officer of TIB on March 17, 1981, and was elected as a director of TIB on January 19, 1982. He served as a director and as president until his resignation on May 12, 1987. Additionally, he served as chairman of TIB's loan committee from April 28, 1981, until April 28, 1987. Defendant Weaver became a director of TIB on January 19, 1982, and he served as a director until his resignation on April 28, 1987. Defendant Maloy was a loan officer for TIB from January 18, 1983, through April 28, 1987. Additionally, he served as vice-chairman of the loan committee from January 18, 1983, until August 26, 1984. Although there is some dispute, it appears that Maloy was a nonvoting advisory director from April 1984

until he was elected as a full board member in 1986 or 1987.

The structure of TIB's organization with respect to its lending function is somewhat complicated. Until April 21, 1982, there was a "Loan and Discount Committee" made up of TIB directors. This committee was not re-elected by the board on that date, and the board did not again establish a board level loan committee until August 21, 1984, when it created the "Executive and Loan Committee." From December 31, 1980, to August 27, 1984, TIB's lending functions were supervised by a loan committee composed of Dawson, Maloy, and other bank officers.

This suit was brought by the FDIC based on the activities of defendant Desselle, who is not a party to this appeal. Desselle was hired by TIB as a loan officer on or about August 31, 1981, and he was elected a vice-president on September 15, 1981. The FDIC alleges that Desselle, Maloy, and Dawson made a series of 82 unsafe and unsound loans beginning on February 18, 1982, and continuing through October 5, 1984. The FDIC also alleges that these loans constituted unsafe and unsound banking practices that should have been detected and prevented by Dawson and the other members of TIB's board of directors. Desselle resigned effective January 1984. The last allegedly unsound loan was made by Dawson on October 5, 1984.

Having been appointed receiver of TIB, the FDIC brought suit against Dawson, Weaver, Maloy, and Desselle on April 2, 1990. The complaint alleged negligence and breach of fiduciary duty on the part of the defendant directors for a number of acts and omissions related to their failure to supervise Desselle. The complaint also alleged that the defendant directors' acts and omissions constituted a breach of

a contract formed when each director took his oath of office. The FDIC moved for summary judgment against Desselle, and the district court entered summary judgment against Desselle after he failed to respond.

Dawson and Weaver moved for dismissal and summary judgment as to all of the FDIC's claims, alleging that the claims were barred by the statute of limitations. On December 10, 1991, the district court granted Weaver's motions for summary judgment and to dismiss; it denied Dawson's motion for summary judgment as moot and granted his motion to dismiss. Maloy then moved for summary judgment and to dismiss, and his motion was granted on May 4, 1992. This appeal followed.

II.

Because the parties presented matters outside the pleadings to the court and the court did not exclude them in deciding these motions to dismiss and motions for summary judgment, we treat all of the district court's decisions as summary judgment decisions. Fed. R. Civ. P. 12(b), (c); *see also Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 462, 121 L.Ed.2d 371 (1992). We review the grant of summary judgment de novo, using the same criteria used by the district court in the first instance. *Id.* The evidence and inferences to be drawn therefrom are reviewed in the light most favorable to the non-moving party. *Id.* Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We note also that,

in reviewing the record, we are not bound to the grounds articulated by the district court for granting summary judgment, for we may affirm the judgment on other grounds. *Harbor Ins. Co. v. Urban Constr. Co.*, 990 F.2d 195, 199 (5th Cir.1993).

III.

The FDIC presents two arguments for reversal. First, it argues that the statute of limitations was tolled during the tenure of the corporate wrongdoers under the doctrine of adverse domination. Second, the FDIC argues that the district court erred by applying the tort statute of limitations to its claim based on the directors' oath of office instead of the longer statute of limitations for breach of contract actions. We address the FDIC's second argument first.

A.

The threshold issue on this appeal is whether the district court applied the correct statute of limitations to the FDIC's claims. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")[1] provides a federal statute of limitations for claims brought by the FDIC as receiver. 12 U.S.C. § 1821(d)(14).[2] This statute, however, has been

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[1] Pub. L. No. 101-73, 103 Stat. 183 (1989).

[2] 12 U.S.C. § 1821(d)(14) provides:

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

interpreted not to revive stale state law claims acquired by the FDIC. *Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 619 (5th Cir.1993); *FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir.1993); *FDIC v. Shrader & York*, 991 F.2d 216, 220 (5th Cir.1993); *FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2440, 124 L.Ed.2d 658 (1993); *see also Resolution Trust Corp. v. Krantz*, 757 F. Supp. 915, 921 (N.D. Ill. 1991) (reasoning that a literal reading of the statute would allow the FDIC to "revive claims relating to acts done during the Great Depression" by merely taking receivership of a bank). Under these cases, the district court must first determine whether the claims being brought by the FDIC were viable under the applicable state statute of limitations at the time the FDIC was appointed receiver. If the state statute has not yet run, the period provided by 12 U.S.C. § 1821(d)(14)(A) then begins to run. *See, e.g., Shrader & York*, 991 F.2d at 220-27 (holding that a legal

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(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the [FDIC] as conservator or receiver; or

(ii) the date on which the cause of action accrues.

malpractice claim brought by the FDIC was time-barred because the Texas statute of limitations had expired before the FDIC was appointed receiver); *FDIC v. Howse*, 736 F. Supp. 1437, 1447 (S.D. Tex. 1990) (holding that the period provided in 12 U.S.C. § 1821(d)(14) begins to run when the FDIC is appointed receiver, as long as the state limitations period has not already expired).

The district court applied the correct analysis to the FDIC's claims, first deciding whether the claims had expired under Texas law before the FDIC was appointed as receiver. The Texas statute of limitations for negligence and breach of fiduciary duty is two years. Tex.Civ.Prac. & Rem.Code Ann. § 16.003 (Vernon 1986); *Hoover v. Gregory*, 835 S.W.2d 668, 676 (Tex. App.—Dallas 1992, writ denied). The Texas statute of limitations for contract claims is four years. Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986). The district court applied the two-year statute of limitations to all of the FDIC's claims, holding that the FDIC's claim for breach of contract actually sounded in tort.

The FDIC argues that the four-year limitations period should apply to its "breach of contract" claim against the appellants for violating their oath of office, in which they promised to diligently execute their duties and neither to violate nor to permit to be violated any law of the United States. According to the FDIC there is a "substantial question" as to whether this claim sounds in tort or contract, and therefore the district court should have applied the longer statute of limitations. *Badaracco v. Commissioner*, 464 U.S. 386, 391, 104 S. Ct. 756, 760, 78 L.Ed.2d 549 (1984) ("Statutes of limitation sought to be applied to bar rights of the Government, must

receive a strict construction in favor of the Government.").

There is no substantial question regarding this issue; the law in this circuit is long-settled that claims based upon an oath of office sound in tort. *McNair v. Burt*, 68 F.2d 814, 816 (5th Cir. 1934) ("This suit must rest, not upon the oath, but upon the statutory and common-law right to recover for negligence and dereliction of duty in the management of the bank's affairs."). It is well-established that one panel of our court will not overturn another absent an intervening precedent by our court sitting en banc or a Supreme Court precedent. *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992). We have discovered no such cases, nor has the FDIC directed our attention to any. The cases cited by the FDIC from other circuits contrary to our holding in *McNair* do not justify a departure from our own precedent. We therefore adhere to our holding in *McNair* that claims based on the oath of office taken by bank directors sound in tort and are subject to the tort statute of limitations.

The district court correctly applied the two-year statute of limitations to all of the FDIC's claims. The FDIC was appointed receiver no earlier than May 21, 1987. The unsound banking practices on which this suit is based ended in 1984. Unless there exists some reason to toll the statute, the district court was correct to grant summary judgment in favor of the appellees based on limitations.

B.

The FDIC argues that the doctrine of adverse domination tolled the statute of limitations in this case so that the claims it acquired upon being appointed receiver were not time-barred. Generally a

statute of limitations begins to run against an action against directors of a corporation for malfeasance or nonfeasance from the time of the perpetration of the wrongs complained of. 3A Stephen M. Flanagan & Charles R.P. Keating, *Fletcher Cyclopedia of the Law of Private Corporations* § 1306 (1986). The doctrine of adverse domination, however, tolls the statute of limitations for as long as a corporate plaintiff continues under the domination of the wrongdoers. *Id.* § 1306.2. The FDIC argues that the doctrine of adverse domination made this case inappropriate for summary judgment. Before proceeding to the merits of this argument, however, we must resolve several preliminary disputes.

Standard of Review

The parties disagree as to the appropriate standard of review of the district court's decision on this issue. The FDIC argues that we should apply the ordinary de novo standard to the adverse domination issue because the district court ruled on the issue by way of granting summary judgment. The appellees, on the other hand, argue that we should apply an abuse of discretion standard because adverse domination is an equitable doctrine. In the past we have applied the de novo standard of review to similar facts. *Cruz v. Carpenter*, 893 F.2d 84, 87 (5th Cir.1990) (reviewing de novo a summary judgment granted by a district court over the plaintiff's assertion of the adverse domination doctrine). Because the district court held that equitable tolling was unavailable as a matter of law and did not withhold equitable tolling simply as a matter of discretion, we follow *Cruz* and apply the de novo standard of review.

Waiver

Next, appellee Weaver raises the argument that the FDIC may not rely on adverse domination because it did not plead the doctrine in either its original or its amended complaint. We note that the pleading requirements in federal court are governed by Federal Rule of Civil Procedure 8 rather than by state law. *Simpson v. James*, 903 F.2d 372, 375 (5th Cir. 1990). Professors Wright and Miller have observed that raising the limitations defense in a motion to dismiss may easily be premature because facts tolling the running of the statute do not necessarily appear in the complaint. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1277 (1990) ("[I]n practice, courts that allow the adjudication of affirmative defenses on a motion to dismiss or for judgment on the pleadings are converting these motions into summary judgment motions and normally will give all parties the opportunity provided by Rule 56 to present pertinent evidentiary material to the court.") The court properly allowed the parties to present affidavit evidence with the motions and responses and treated the motions as for summary judgment. Fed.R.Civ.P. 12(b), (c). Weaver's contention is without merit.

State or Federal Law?

An important preliminary issue not specifically addressed by the parties is whether state or federal law governs the FDIC's assertion of the adverse domination doctrine. The Tenth Circuit has squarely held in a similar case that the question of whether the state's statute of limitations was equitably tolled was a question of federal law. *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d 1520, 1522 (10th Cir.1990). Under the *Bryan* court's analysis, when

the FDIC brings a claim against the directors of a failed bank, the trial court should "borrow" the appropriate state statute of limitations and apply it to the FDIC's claims. *Id.* Under a line of precedent traceable to the case of *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L.Ed. 743 (1946), the *Bryan* court also held that the question of equitable tolling remained one of federal law, despite the borrowing of the state statute of limitations. Thus, the *Bryan* court adopted the adverse domination doctrine as part of the federal common law of the Tenth Circuit and applied it to the FDIC's claims. *Id.* at 1522-23.

We are not convinced that the *Bryan* court is correct in its statement that federal equitable tolling principles apply when federal courts borrow state statutes of limitations. As the Seventh Circuit has recently noted, the continued vitality of *Holmberg* and its progeny is in doubt after the Supreme Court's decisions in *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), and *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). *See Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992). These Supreme Court cases have held that, when state statutes of limitation are borrowed, state tolling principles are to be the "primary guide" of the federal court. *Johnson*, 421 U.S. at 465, 95 S. Ct. at 1722. The federal court may disregard the state tolling rule only if it is inconsistent with federal policy. *Tomanio*, 446 U.S. at 485-86, 100 S. Ct. at 1795-96. The *Bryan* court thus misread the current law

regarding the proper source of tolling rules for federal courts that borrow a state statute of limitations.[3]

Wholly apart from the flaws in the *Bryan* court's reasoning, we disagree with its holding for the more fundamental reason that the federal court is not "borrowing" a state statute of limitations at all in these cases brought by the FDIC under FIRREA. As was well said in *Howse*, the first step in the analysis of the limitations issue is whether the applicable state statute of limitations had already expired when the FDIC acquired the claim. *Howse*, 736 F. Supp. at 1440. That is, because the FDIC is merely acquiring the claims held by the failed bank, the issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver. Only if the bank's claims are still viable under state law on that date does the limitations clock start to run anew under FIRREA's limitations provision. Because this step of the analysis is purely a question of state law, there is no justification for applying federal equitable tolling principles to pre-receivership events. If the FDIC is to toll the state statute of limitations prior to its appointment as receiver under the adverse domination doctrine, it must show the district court that the state law of adverse domination would permit tolling. Thus, we decline to follow the approach of the *Bryan* court, and we hold that the Texas law of adverse domination applies.

Texas Law of Adverse Domination

Having determined that Texas law governs the application of the adverse domination doctrine in this

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[3] *But see Smith*, 951 F.2d at 840 (stating that *Johnson* and *Tomanio* do not necessarily prevent a federal court from applying both state and federal tolling principles).

case, we must next determine the contours of that doctrine in Texas. As will be seen, Texas case law on the topic is sparse, and our interpretation of Texas law will be informed by modern trends in adverse domination law from other jurisdictions. We focus on three questions of paramount importance in this case: (1) How completely must the wrongdoers dominate their corporation in order to trigger adverse domination tolling? (2) Must a plaintiff relying on the adverse domination doctrine sue all allegedly culpable directors? (3) How culpable must a director's conduct be before he will be considered a "wrongdoer" within the meaning of the adverse domination doctrine?

(1)

Two competing theories have emerged with respect to the showing a plaintiff must make in order to establish "domination" of a corporation by wrongdoers. The more difficult test is the "complete domination" test, under which a plaintiff who seeks to toll the statute under adverse domination must show "full, complete and exclusive control in the directors or officers charged." *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.) (quoting *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 414 (2d Cir.), *cert. denied*, 387 U.S. 921, 87 S. Ct. 2031, 18 L.Ed.2d 975 (1967)), *cert. denied*, 469 U.S. 932, 105 S. Ct. 329, 83 L.Ed.2d 265 (1984). Once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue. *Id.*

Other courts have taken a more prophylactic approach known as the "majority test." Under this approach, the plaintiff need not show that the wrongdoers completely dominated the corporation,

but rather must show only that a majority of the board members were wrongdoers during period [*sic*] the plaintiff seeks to toll the statute. *Howse*, 736 F.Supp. at 1441-42; *Federal Sav. and Loan Ass'n v. Williams*, 599 F.Supp. 1184, 1193-94 (D.Md. 1984). These cases reason that the mere existence of a culpable majority on the board is so likely to preclude the corporation from filing suit against the wrongdoers that tolling is thereby justified. *See, e.g., Williams*, 599 F.Supp. at 1194. Perhaps an even stronger argument for the "majority test" is the possibility of concealment:

> As long as the majority of the board of directors are culpable they may continue to operate the association and control it in an effort to prevent action from being taken against them. While they retain control they can dominate the non-culpable directors and control the most likely sources of information and funding necessary to pursue the rights of the association. As a result it may be extremely difficult, if not impossible, for the corporation to discover and pursue its rights while the wrongdoers retain control.

Id. at 1193-94 n. 12.

We agree with the *Howse* court that Texas follows the "majority" version of the adverse domination doctrine. *Howse*, 736 F.Supp. at 1441. The controlling case is *Allen v. Wilkerson*, 396 S.W.2d 493 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.). As the *Allen* court plainly stated, "In order for limitations to run against a corporation's right of action against one of its own directors, two things must concur: (1) notice (2) to a disinterested majority of its board members." *Id.* at 500; *see also id.* at 501 ("[W]here . . . the corporation is de facto powerless to sue on such cause

of action because of the lack of a disinterested majority of its board, mere notice to shareholders does not start running of limitations against the corporate cause of action."). *Allen* thus demonstrated that Texas law is in accord with the "majority" version of the adverse domination rule. The FDIC's burden, therefore, was to raise a genuine issue of fact as to whether a majority of TIB's board was composed of wrongdoers through May 21, 1985, two years before the FDIC's appointment as receiver.

(2)

The issue most hotly contested by the parties is whether a plaintiff seeking to toll the statute of limitations under the adverse domination doctrine must sue all allegedly culpable directors. The FDIC argues that there is no requirement that all culpable directors must be sued in order for adverse domination to apply, although plainly the FDIC would still bear the burden of proving that a majority of the directors was culpable to obtain the benefit of the adverse domination doctrine. The appellees, on the other hand, argue that the cases indicate that all directors constituting the culpable majority must be sued.

Again, *Allen* provides this court with the necessary guidance. In *Allen*, the plaintiff was the creditor of a corporation, and he sued one member of the corporate debtor's four-person board for withdrawing funds from the corporation's account. *Id.* at 500-01. The case was tried to the court, and the defendant raised limitations as a defense. The trial judge granted judgment in favor of the plaintiff without making findings of fact, thereby implicitly holding that the statute had been tolled. *Id.* at 496, 500. The court of civil appeals affirmed, holding that the trial

judge could properly have tolled the statute because there was sufficient evidence that one of the three non-defendant directors was also not "disinterested." *Id.* at 501. *Allen* thus plainly demonstrates that a plaintiff may sue only a minority of the board and still assert adverse domination to toll the statute of limitations under Texas law.

The appellees urge that the *Allen* rule will work injustice to defendant directors because it will force them to defend the non-defendant directors when those directors have neither the standing nor the incentive to provide their own defense. The FDIC responds that it must be free to make independent litigation decisions regarding which directors it will sue and not sue. As the FDIC points out, there may be a host of reasons for it to choose to sue less than a majority of the board, such as a prior or pending discharge in bankruptcy, prior settlement of the claim or a prior restitution order, pendency of criminal proceedings against an individual or entity, judicial economy, and cost-effectiveness.

In response to the appellees' concerns, we note that the plaintiff still bears the burden of proving that a majority of the board consisted of wrongdoers for the relevant time period; the *Allen* rule does not shift onto the defendants the burden of proving that a majority of the board was *not* culpable. Nor is it necessarily true that the non-defendant directors have no incentive to fight the plaintiff's allegations that they were culpable. If shown to be culpable, the non-defendant directors could possibly be held liable to the defendant directors for contribution, or could later be joined as defendants themselves. In any event, our responsibility here is to apply Texas law as it exists, not to make policy decisions about what that law should be. The district court incorrectly as-

sumed that the adverse domination doctrine could not apply because the FDIC sued fewer than a majority of TIB's board of directors.

(3)

The final issue is whether Texas law would allow a plaintiff to establish the adverse domination doctrine by proving that a majority of a corporation's directors was merely negligent. We phrase the issue in this manner because our review of the summary judgment evidence shows that the FDIC raised an issue of fact with respect to whether TIB's board may have been negligent in supervising Desselle's lending activities. The FDIC filed with the district court the affidavit of an expert witness, William Watkins, who reviewed numerous TIB documents and OCC reports regarding TIB. According to the Watkins affidavit, the OCC cited TIB several times for serious deficiencies in its lending operations between January 1982 and May 1987. The TIB board "knew of and discussed at numerous board meetings the serious problems disclosed in the OCC examination reports between May 1982 and April 1987." In particular, Watkins opined that it was a "serious deficiency" for the TIB board to delegate oversight of the lending function to a loan committee composed entirely of internal bank employees up until August 1984. From these facts, we conclude that the FDIC raised a genuine issue of fact as to whether the non-defendant directors of TIB may have been negligent, but that it did not produce any evidence that the non-defendant directors were active participants in wrongdoing or fraud.

Texas case law provides little guidance to this court on this issue. Plainly in *Allen* the defendant director, who was sued for withdrawing funds from the corporation's accounts, acted with more than

mere negligence. *Allen*, 396 S.W.2d at 500-01. In *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex.1963), the other Texas case cited by the FDIC, the defendant directors were charged not only with breach of fiduciary duty and mismanagement, but also with conspiracy, misappropriation of corporate funds, and the usurpation of corporate opportunities. *Id.* at 570. No Texas case comes to light in which the adverse domination doctrine has been invoked based on the mere negligence of a majority of a corporation's directors.

We therefore turn to the law of other jurisdictions in order to predict how a Texas court would decide this issue. Before doing so, we remind ourselves that statutes of limitations are themselves expressions of important legislative policies and should not be judicially abrogated without due consideration of those policies. As the Texas Supreme Court has stated, statutes of limitations

> afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. The purpose of a statute of limitations is to establish a point of repose and to terminate stale claims.

Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990) (citing *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 545-46 (Tex. 1986)). We consider also the longstanding Texas rule that the tort statute of limitations begins to run when the tort is committed, absent a statute to the contrary or

fraudulent concealment. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967) (citing *Quinn v. Press*, 135 Tex. 60, 140 S.W.2d 438 (1940)).

The development of the adverse domination doctrine under state law in recent years has occurred almost exclusively in federal courts, with many district courts predicting in the absence of controlling state precedent that the states in which they sit would adopt the doctrine. *See, e.g., Resolution Trust Corp. v. Kerr*, 804 F.Supp. 1091, 1094, 1097 (W.D. Ark. 1992); *Resolution Trust Corp. v. Hecht*, 818 F. Supp. 894, 899 (D. Md. 1992); *FDIC v. Hudson*, 673 F. Supp. 1039, 1043 (D. Kan. 1987). Federal district courts have liberally applied the doctrine in favor of government-appointed receivers when they sue the directors of a failed bank, regardless of the nature of the claims. The court in *Hecht* applied the doctrine in a case in which the RTC alleged breach of fiduciary duty, negligence, gross negligence, and breach of contract, but did not allege any form of self-dealing or fraudulent conduct. *Hecht*, 818 F.Supp. at 896, 898. More notably, the district court for the district of Minnesota has applied adverse domination tolling to the FDIC's claims against the directors of a failed bank based on negligence alone. *FDIC v. Carlson*, 698 F.Supp. 178, 180 (D. Minn. 1988). Under the *Carlson* approach, adverse domination tolling could be available to the FDIC in the instant case.

We do not believe that Texas courts would extend the "very narrow doctrine," *Shrader & York*, 991 F.2d at 227, of adverse domination to cases in which the wrongdoing by a majority of the board amounts to mere negligence. To do so would effectively eliminate the statute of limitations in all cases involving a corporation's claims against its own directors. Taking our own case as a paradigm, it could almost always be

said that when one or two directors actively injure the corporation, or profit at the corporation's expense, the remaining directors are at least negligent for failing to exercise "every precaution or investigation." *Holloway*, 368 S.W.2d at 580. If adverse domination theory is not to overthrow the statute of limitations completely in the corporate context, it must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent.

California cases such as *Burt v. Irvine Co.*, 237 Cal. App. 2d 828, 46 Cal. Rptr. 392 (1965), support our conclusion. In that case the court described the adverse domination doctrine by saying that "it is generally held that an action *for fraud* committed against a corporation is tolled for the period that those responsible for the fraud remain in control of the corporation." *Id.* 47 Cal. Rptr. at 417 (emphasis added) (citations omitted). Further, "[t]he principle does not apply after discovery of the fraud by a protesting stockholder, and *cannot be applied to a cause of action predicated upon negligence.*" *Id.* (emphasis added) (citations omitted); *see also Whitten v. Dabney*, 171 Cal. 621, 154 P. 312, 315 (1915) ("So long as the corporation itself remains under disability and is powerless to act by virtue of the fact that its control is in the hands of a board of directors accused of participation in the frauds, the statute of limitations does not run against it.").

The facts of the instant case demonstrate that the adverse domination theory is inappropriate when the majority of the board is merely negligent. The FDIC's own evidence tended to show that most of TIB's directors may have been negligent in failing to supervise the lending functions. Yet, at the same time, the board never concealed its "serious deficien-

cies" from examination by the OCC or anyone else. Even after the OCC notified TIB's board of its shortcomings in supervising TIB's lending function, there is no evidence to suggest that an organized majority coalesced to prevent any other parties from discovering the problems. Thus, the danger of fraudulent concealment by a culpable majority of a corporation's board seems small indeed when the culpable directors' behavior consists only of negligence, and the presumption of such concealment that underlies the adverse domination theory is unwarranted.

We therefore hold that, under Texas law, a corporate plaintiff cannot toll the statute of limitations under the doctrine of adverse domination unless it shows that a majority of its directors was more than negligent for the desired tolling period.[4] Because the FDIC's summary judgment evidence, viewed in the light most favorable to the FDIC, showed only negligence on the part of the majority of TIB's board of directors, summary judgment in favor of the defendants was proper.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[4] We need not address the issue of precisely how culpable a majority of directors must be before adverse domination tolling is available, and we accordingly express no opinion on the subject beyond today's holding that mere negligence is not enough.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-1120

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK, N.A.,
PLAINTIFF

v.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER,
MICHAEL D. MALOY AND WAYNE DESSELLE,
DEFENDANTS

[Entered Dec. 10, 1991]

ORDER

Pending before the Court are:

A. plaintiff Federal Deposit Insurance Corporation ("FDIC") as Receiver of Texas Investment Bank, N.A. ("TIB") [*sic*] motion for leave to file second amended complaint (Document #57) and motion for partial summary judgment (Document #77);

B. defendant Michael D. Maloy's ("Maloy") motion to dismiss (Document #13);

C. defendant Kirk K. Weaver's ("Weaver") motion to dismiss and motion for summary judgment

(Document #29) and motion for judgment on the pleadings (Document #46); and

D. defendant Rockleigh S. Dawson, Jr.'s ("Dawson") motion for summary judgment (Document #38), motion to dismiss (Document #39), and motion for judgment on the pleadings (Document #44).

This Court has considered the motions, the submissions, argument of counsel in open court, and the applicable law, and rules as follows.

FDIC motion for leave to file second amended complaint:

FDIC currently seeks to hold all defendants liable for negligent conduct in connection with their responsibilities as officers and directors of the failed bank, TIB. FDIC asks this Court to permit an amendment to the complaint to allege both negligence and gross negligence. This Court determines that the motion should be denied.

FDIC motion for partial summary judgment:

The instant motion for partial summary judgment was filed on August 20, 1991. The submission date was thereafter set at September 9, 1991 pursuant to Local Rule 6(E). Defendant Wayne E. Desselle ("Desselle") has failed to respond. Thus, pursuant to Local Rule 6(E), the motion is deemed unopposed.

Further, through uncontroverted summary judgment evidence, FDIC has established that Desselle was negligent and grossly negligent is [*sic*] the exercise of his duties as an officer of TIB. *See Meyers v. Moody*, 693 F.2d 1196 (5th Cir. 1982), *cert. denied*, 464 U.S. 920 (1983). As such, FDIC is entitled to judgment against Desselle as a matter of law.

Maloy's motion to dismiss:

In his motion, Maloy asks this Court to dismiss FDIC's claim under Federal Rule of Civil Procedure 12(b)(6). Maloy asserts that FDIC's complaint fails to state a claim because during the periods of alleged wrongdoing by the board of directors, he was a nonvoting member. This Court determines that the motion should be denied.

Weaver and Dawson's motion to dismiss:

Weaver and Dawson ask this Court to dismiss FDIC's claims against them, in part, because the statute of limitations has expired as to all stated claims.

Statute of Limitations

I. Applicable Limitation Period

In its amended complaint, the FDIC alleges three causes of action: (1) negligence and breach of fiduciary duty against all defendants and (2) breach of contract against Dawson and Weaver. In Texas, tort claims are governed by a two-year statute of limitation. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986). Negligence and breach of fiduciary duty both sound in tort and are, therefore, governed by the two-year statute of limitation. *See Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

In Texas, a contract claim is generally governed by a four-year statute of limitation. Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986). However, when a claim stated as a contract claim sounds in tort, it should be governed by the two-year tort statute of limitation. *See McNair v. Burt*, 68 F.2d 814, 815 (5th Cir. 1934). In the instant case, FDIC's claims for breach of contract are based upon the alleged failure of two defendants to fulfill their

obligations pursuant to the oath of office taken for board of director to a bank. The oath is as follows:

> "I, the undersigned, a director of the above-named bank [Texas Investment Bank, N.A.], being a citizen of the United States, do solemnly swear [affirm] that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the statutes of the United States under which this association has been organized . . . ."

The breach of an oath of this type sounds in tort. *McNair*, 68 F.2d at 815 (5th Cir. 1934). Although FDIC suggests that *McNair* is not authoritative because of contrary caselaw in the Ninth and Tenth Circuit Courts of Appeal, FDIC does not suggest that *McNair* has ever been overruled by the Fifth Circuit Court of Appeals or the United States Supreme Court. As such, in the Fifth Circuit, an action for breach of an director's oath of office sounds in tort and is governed by the two-year statute of limitation.

II. Accrual of Causes of Action

Causes of action which sound in tort generally accrue when the tort is committed. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967). Causes of action which sound in contract generally accrue at the time of the breach. *Hurbrough v. Cain*, 571 S.W.2d 216, 221 (Tex. Civ. App. - Tyler 1978, no writ). A cause of action for breach of fiduciary duty accrues when the duty is breached. *Leigh v. Weiner*, 679 S.W. 2d 46, 49 (Tex.App. - Houston [14th Dist.] 1984, no writ).

In its amended complaint, the FDIC alleges wrongful conduct of all defendants in connection with

loans made or renewed through October 5, 1984. Thus, any claims which TIB had against any of the defendants accrued no later than October 5, 1984. Therefore, the statute of limitations on all claims expired on October 5, 1986.

III. Adverse Domination Tolling

The adverse domination rule provides a tolling of the statute of limitations in actions by a corporation against its directors when the allegedly culpable directors constitute a majority of the board of directors. *FDIC v. Howse*, 736 F. Supp. 1437, 1441 (S.D. Tex. 1990). In its amended complaint, FDIC asserts wrongful conduct on the part of two directors, Dawson and Weaver. At all times during the alleged wrongful conduct, the board of directors was comprised of nine voting members. Therefore, at no time during the alleged wrongful conduct did Dawson and Weaver constitute a majority of the board of directors. Therefore, the adverse domination theory does not apply to the facts pled in this case.

IV. Statute of Limitation Expires

As the causes of action for negligence accrued no later than October 5, 1984 and a two-year statute of limitations applies, the statute of limitations as to negligence/gross negligence expired no later than October 5, 1986. FDIC was appointed receiver for TIB on May 27, 1987. When the state statute of limitations has run prior to the onset of receivership, the FDIC cannot obtain the advantage of the longer federal limitations. *FDIC v. Howse*, 736 F. Supp. 1437, 1440 (S.D. Tex. 1990). Therefore, FDIC claims against both Weaver and Dawson are barred.

As this Court dismisses the FDIC claims as barred by the statute of limitations, the Court need not

address the remaining grounds for dismissal raised by Weaver and Dawson.

Based upon the foregoing, it is

ORDERED that:

A. plaintiff Federal Deposit Insurance Corporation's ("FDIC") motion for leave to file second amended complaint (Document #57) is DENIED and motion for partial summary judgment (Document #77) is GRANTED;

B. defendant Michael D. Maloy's ("Maloy") motion to dismiss (Document #13) is DENIED;

C. defendant Kirk K. Weaver's ("Weaver") motion to dismiss and motion for summary judgment (Document #29) is GRANTED, and motion for judgment on the pleadings (Document #46) is DENIED as MOOT; and

D. defendant Rockleigh S. Dawson, Jr.'s ("Dawson") motion for summary judgment (Document #38) is DENIED as MOOT, motion to dismiss (Document #39) is GRANTED, and motion for judgment on the pleadings (Document #44) is DENIED as MOOT.

All relief not specifically granted herein is DENIED.

SIGNED at Houston, Texas, on this the 3 day of Dec., 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-1120

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK, N.A.,
PLAINTIFF

vs.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER,
MICHAEL D. MALOY AND WAYNE DESSELLE,
DEFENDANTS

[Entered May 4, 1992]

ORDER

Pending before the Court is the motion to dismiss and motion for summary judgment (Document #90) filed by defendant Michael D. Maloy ("Maloy"). Also pending is the motion for severance and entry of final judgment as to defendants Dawson and Weaver (Document #92) filed by defendants Rockleigh S. Dawson, Jr.'s [*sic*] ("Dawson") and defendant Kirk K. Weaver's [*sic*] ("Weaver"). Having considered the motions, the submissions, and the applicable law, the Court determines that the motion to dismiss and motion for summary judgment should be granted and

the motion for severance and entry of final judgment as to defendants Dawson and Weaver should be denied as moot.

Through its motion, Maloy asks this Court to dismiss FDIC's claims against him because the statute of limitations has expired as to all stated claims. This Court has previously determined that the FDIC's claims against Dawson and Weaver are barred by the statute of limitations. FDIC has asserted the same claims against Maloy that were asserted against Dawson and Weaver. Accordingly, this Court adopts its previous findings and conclusions (Document #88) herein and determines that the FDIC's claims against Maloy are barred by the statute of limitations. It is, therefore,

ORDERED that Maloy's motion to dismiss and motion for summary judgment (Document #90) is GRANTED. It is further ORDERED that Dawson and Weaver's motion for severance and entry of final judgment as to defendants Dawson and Weaver (Document #92) is DENIED as MOOT.

SIGNED at Houston, Texas, on this the 3 day of April, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2460

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK,
PLAINTIFF-APPELLANT

Versus

ROCKLEIGH S. DAWSON, JR., ET AL.,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

[Filed Dec. 21, 1993]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before: REAVLEY, KING and GARWOOD, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
Carolyn Dineen King
United States Circuit Judge

REHG-6

Supreme Court, U.S.
FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1486

In The

Supreme Court of the United States

October Term, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF TEXAS INVESTMENT BANK, N.A.,

Petitioner,

v.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER, AND MICHAEL D. MALOY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENT, KIRK K. WEAVER

J. MICHAEL DORMAN
Counsel of Record

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QUESTION RESTATED

May a federal court consider state tolling principles when deciding whether a state-created right expired under a state statute of limitations?

TABLE OF CONTENTS

Page(s)

QUESTION RESTATED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

SUMMARY 2

FACTUAL AND PROCEDURAL BACKGROUND ... 5

REASONS FOR DENYING THE PETITION 9

A. State Law Determines Whether A State Statute Of Limitations Bars A State Law Claim 9

B. No Conflict Exists With The Tenth Circuit's Opinion In *Bryan* 12

C. A Federal Common Law Rule Is Inappropriate When Enforcing A State Law Claim 14

D. The Equitable Principles At Issue In O'Melveny Have No Application To This Case 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Austrian v. Williams, 198 F.2d 697 (2d Cir.), *cert. denied*, 344 U.S. 909 (1952) 2, 9, 11, 16

Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790 (1980) 13

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938) 2, 9, 18

Farmers & Merchants National Bank v. Bryan, 902 F.2d 1520 (10th Cir. 1990) ..... *passim*

FDIC v. Cardona, 723 F.2d 132 (1st Cir. 1983) 4, 10

FDIC v. Cocke, 7 F.3d 396 (4th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1483) 12, 15

FDIC v. Consolidated Mortgage Finance Corp., 805 F.2d 14 (1st Cir. 1986) 12

FDIC v. Dawson, 4 F.3d 1303 (1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1486) ..... *passim*

FDIC v. Hinkson, 848 F.2d 432 (3d Cir. 1988) 4, 10

FDIC v. Howse, 736 F. Supp. 1437 (S.D. Tex. 1990) 7

FDIC v. Rogier Carr & Monroe, 996 F.2d 222 (10th Cir. 1993) 5, 10

Guaranty Trust Co. v. United States, 304 U.S. 126, 58 S.Ct. 785 (1938) 2, 4, 5, 9, 10, 17

Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464 (1938) 2, 9, 10, 18

Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 583 (1946) 11

TABLE OF AUTHORITIES – Continued

Page(s)

International Rys. of Cent. Am. v. United Fruit Co., 373 F.2d 408, 414 (2d Cir.), *cert. denied*, 387 U.S. 921, 87 S.Ct. 2031 (1967) 7

Johnson v. Railway Express Agency, 421 U.S. 454, 95 S.Ct. 1716 (1975) 4, 13, 14, 15

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) 7

O'Melveny & Myers v. FDIC, *cert. granted*, No. 93-489 (Nov. 29, 1993) 17, 18

Resolution Trust Corp. v. Everhart, 837 F.Supp. 155 (E.D.Va. 1993) 12

Resolution Trust Corp. v. Seale, 13 F.3d 850 (5th Cir. 1994) 12, 16

Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991 (1978) 15

RTC v. Hecht, 833 F.Supp. 529 (D.Md. 1993)..... 17

Smith v. City of Chicago Heights, 951 F.2d 834 (7th Cir. 1992) 4, 13

United States v. Buford, 28 U.S. 12 (1830)..... 4

United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448 (1979) 3, 14

STATE CASES

Burt v. Irvine Co., 237 Cal.App.2d 828, 47 Cal.Rptr. 392 (1965)..... 9

Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826 (Tex. 1990) 16

Whitten v. Dabney, 171 Cal. 621, 154 P. 312 (1915) 9

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

12 U.S.C. §§ 84, 93 12

28 U.S.C. § 1254 2

No. 93-1486

In The

Supreme Court of the United States

October Term, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF TEXAS INVESTMENT BANK, N.A.,

Petitioner,

v.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER, AND MICHAEL D. MALOY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENT, KIRK K. WEAVER

Respondent Kirk K. Weaver respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner's Appendices provide the pertinent opinions.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254.

SUMMARY

The Federal Deposit Insurance Corporation ("FDIC") asks this Court to create a federal common-law rule requiring the application of federal tolling principles when the FDIC, as receiver of a failed bank's assets, asserts the bank's expired state law claims against its former officers or directors. The FDIC, however, omits one essential fact from its petition for writ of certiorari: the claims involved in these cases by the FDIC against former officers and directors of failed institutions are entirely creatures of state law. That fact is critical because this Court has long held that "if a plea of the statute of limitations would bar recovery in a State court [on a state law claim], a federal court ought not to afford recovery." *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945).

Although this Court based its decision in *York* on the federalism principles articulated in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), it does not depend on diversity jurisdiction. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785 (1938) ("*Guaranty Trust Co.*") (United States cannot rely on equitable principles to defeat state statute of limitations when claim expired before United States acquired it; jurisdiction premised on United States as party); *Austrian v. Williams*, 198 F.2d 697, 702 (2d Cir.) ("state statutes of limitations must be applied as interpreted by the state

courts," where state law claim is brought under Bankruptcy Act), *cert. denied*, 344 U.S. 909 (1952). That the claims in this case derive entirely from state law is also critical because this Court has held that the creation of a federal common law rule is inappropriate when "state law governs the controvers[y]." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718, 99 S.Ct. 1448, 1453 (1979).

That these claims derive from state law also establishes the lack of any conflict between the Fifth Circuit's opinion in this case and the Tenth Circuit's opinion in *Farmers & Merchants National Bank v. Bryan*, 902 F.2d 1520 (10th Cir. 1990).[1] The *Bryan* case dealt with federal statutory, not state law causes of action. The *Bryan* court considered only whether Federal tolling principles should apply when a federal court "borrows" a state statute of limitations because no federal statute applies to the federal claim. In *Dawson*, however, the court did not "borrow" a state statute of limitations. Rather, the court applied the Texas statute of limitations to a Texas law claim. *See, e.g., FDIC v. Dawson*, 4 F.3d 1303, 1308-09 (1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar.

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[1] In fact, a careful reading of the *Bryan* decision by the Tenth Circuit, the order of the District Court and the briefs of the appellants and appellees show that the only issues in *Bryan* involved federal causes of action. *See* attached excerpts from the appellant's brief (Appendix C, at App. 9) and the FDIC's brief (Appendix D, at App. 14 and App. 17) filed in *Bryan*. While the Fifth Circuit in its *Dawson* opinion noted that *Bryan* appeared to involve similar issues to the case presented here, in fact, the differences are crucial, because *Bryan* did not involve the issue of whether state tolling principles apply when the FDIC is suing under a state law cause of action.

21, 1994) (No. 93-1486) (court does not borrow state statute of limitations when FDIC asserts state law claim). And under this Court's consistent precedent, which the FDIC fails to discuss, the Fifth Circuit was proper in attempting to apply the Texas statute in the same manner as the Texas courts.

The *Bryan* court, moreover, failed to consider precedent from this Court that makes state law the "primary guide" even when the court must apply a state statute of limitations to a federal law claim. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 463-64, 95 S.Ct. 1716, 1722 (1975). *See also Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992) ("*Johnson* and subsequent cases have held that, when a federal court borrows a state statute of limitations, it should borrow any applicable state tolling provision as well"). Thus *Bryan* does not conflict with the Fifth Circuit's opinion in *Dawson*, and is not authority for the FDIC's contention that federal tolling principles should apply to state law claims.

The FDIC seeks the application of federal tolling principles to these state law claims in the hope of reviving claims that expired under state law before the FDIC acquired them. The principle is well-established, however, that the transfer of an expired claim to the United States or one of its agencies will not revive it. *Guaranty Trust Co.; United States v. Buford*, 28 U.S. 12 (1830) ("the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor"). Furthermore, the circuit courts have uniformly applied this principle to the FDIC's acquisition of expired state law claims. *See, e.g., FDIC v. Cardona*, 723 F.2d 132, 134 (1st Cir. 1983); *FDIC v. Hinkson*, 848 F.2d 432,

434 (3d Cir. 1988); *FDIC v. Dawson*, 4 F.3d 1303, 1309 (1993) *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1486); *FDIC v. Rogier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993). Accordingly, the FDIC cannot rely on its equitable position as receiver in seeking the application of federal tolling principles to these state law claims because it did not own the claims when they expired. *See, e.g., Guaranty Trust Co.*, 304 U.S. at 142, 58 S.Ct. at 793 (1938) (equitable principles applicable to United States as sovereign did not revive claim that expired before assignment to United States); *Dawson*, 4 F.3d at 1309 ("there is no justification for applying federal equitable tolling principles to pre-receivership events").

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 1990, nearly three years after being appointed as receiver for Texas Investment Bank, N.A. ("TIB"), the FDIC sued a former TIB vice-president and member of the TIB loan committee, Wayne C. Desselle.[2] In that complaint, the FDIC alleged that Desselle approved a series of unsound loans, the last of which occurred almost six years earlier. In addition, the FDIC sued two officers and directors of TIB, Rockleigh S. Dawson, Jr., and Michael D. Maloy, who were members of the TIB loan committee, alleging that they breached their fiduciary duties by failing to supervise Desselle's activities properly, and by approving unsound loans while

[2] The FDIC brought suit as a result of the activities of a TIB loan committee that operated from December 31, 1980 until August 27, 1984. Neither Weaver nor any other outside director was a member of that committee.

members of the committee.[3] The FDIC also sued one of TIB's seven outside directors, Weaver, in the mistaken belief that Weaver was a member of the loan committee. *See* Appendix A, at App. 1.

In fact, the FDIC did not initially allege a theory that encompassed Weaver (or any outside director). Rather, it pleaded that members of the loan committee failed to supervise Desselle properly, and it conceded as long ago as January 31, 1991, that Weaver was not a loan committee member. *See* Appendix B (FDIC's Answer to Interrogatories, at App. 5-6).

When Desselle did not respond to the FDIC's motion for summary judgment, the district court entered judgment against him. Dawson and Weaver, in turn, moved for dismissal on the merits, and on the grounds that the statute of limitations barred the FDIC's claims. The district court agreed, finding that the FDIC's claims accrued no later than October 5, 1984, the date of the last challenged loan. Thus, the claims expired under the Texas two-year statute of limitations for torts on October 5, 1986, nearly a year before the United States Office of the Comptroller of the Currency ("OCC") appointed the FDIC as receiver.

Because the statute of limitations clearly expired on the FDIC's claims absent some reason to toll the statue, the FDIC sought to invoke the equitable doctrine of adverse domination. Under that doctrine, the statute of

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[3] Dawson was president and chairman of the loan committee, and Maloy was a loan officer and vice-chairman of the loan committee.

limitations tolls when wrongdoing directors exercise control over a corporation such that shareholders could not reasonably bring suit during the limitations period. *See, e.g., FDIC v. Howse*, 736 F. Supp. 1437, 1441-42 (S.D. Tex. 1990).

The FDIC's pleadings, however, did not support its allegations of adverse domination. Under what is referred to as the "majority test," some jurisdictions require that the plaintiff sue a majority of the board of directors. *Id.* Other jurisdictions apply an even stricter test, requiring proof that the wrongdoing directors exercised complete domination over the board. Under this "complete domination test," the plaintiff must show "full, complete and exclusive control in the directors or officers charged." *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (quoting *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 414 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967)). In addition, "the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." *Mosesian*, 727 F.2d at 879; *Int'l Rys.*, 373 F.2d at 414.

Because the FDIC's allegations of wrongdoing against just three directors would not support adverse domination under either theory, the FDIC asserted for the first time in its opposition to the directors' motions for summary judgment that all of the directors, including those that it chose not to sue, were negligent in their supervisory responsibilities. The district court rejected this theory, however, because the defendants at no time amounted to a "majority of the board of directors." FDIC's Appendix B, p. 26a.

In affirming, the Fifth Circuit decided, as a preliminary issue, that whether the FDIC acquired a viable state law claim under the Texas statute of limitations is a state law question. *Dawson*, 4 F.3d at 1308. The Fifth Circuit's decision to consult Texas limitations law, in fact, was highly favorable to the FDIC because the Fifth Circuit found that Texas does not require that the plaintiff sue a majority of the board, and does not require that the culpable directors completely dominate the board. *Id.* at 1310-11. According to the Fifth Circuit, in order to defeat the summary judgment, the FDIC merely had to create a fact issue on whether a majority of the board were "active participants in wrongdoing or fraud, rather than simply negligent." *Id.* at 1312.

The FDIC, however, failed to meet even this lenient test. *Id.* at 1312-13. The FDIC's summary judgment evidence, the circuit court found, raised a fact issue only on whether the six unnamed outside directors were negligent in failing to detect and prevent the wrongdoing of others. *Id.* To toll the statute in such circumstances, the Fifth Circuit reasoned, "would effectively eliminate the statute of limitations in all cases involving a corporation's claims against its own directors" because "it could almost always be said that when one or two directors actively injure the corporation, or profit at the corporation's expense, the remaining directors are at least negligent for failing to exercise 'every precaution or investigation.' " *Id.* at 1312. "If adverse domination theory is not to overthrow the statute of limitations completely in the corporate context," the Fifth Circuit held, it cannot apply when the directors' alleged culpability amounts only to negligence in failing to detect the wrongdoing of others. *Id.*

In fact, this case illustrates why mere negligence should not toll the statute, the Fifth Circuit reasoned. *Id.* The board never attempted to conceal any deficiencies in its loan practices from "the OCC or anyone else." *Id.* Nor did the FDIC's evidence "suggest that an organized majority coalesced to prevent any other parties from discovering the problems." *Id.* Thus no rationale existed for tolling the statute. *Id.; see also Burt v. Irvine Co.*, 237 Cal.App.2d 828, 47 Cal.Rptr. 392 (1965) (adverse domination "cannot be applied to a cause of action predicated upon negligence"); *Whitten v. Dabney*, 171 Cal. 621, 154 P. 312, 315 (1915).

REASONS FOR DENYING THE PETITION

A. State Law Determines Whether A State Statute Of Limitations Bars A State Law Claim.

The FDIC omits to mention in its petition that the claims involved in this case are entirely creatures of state law. That fact is critical because, based on federalism principles extending back to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), this Court long has held that state law determines whether a state statute of limitations bars the assertion of a state law claim. *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1945). This principle applies, moreover, regardless of the basis for federal court jurisdiction. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785 (1938) (federal court jurisdiction established because the United States was a party); *Austrian v. Williams*, 198 F.2d 697, 702 (2d Cir.) (under Bankruptcy Act), *cert. denied*, 344 U.S. 909 (1952).

In addition, this Court consistently has held that the transfer of a claim to the United States or one of its agencies will not revive a stale claim. *Guaranty Trust Co.*, 304 U.S. at 142, 58 S.Ct. at 793 (1938); *see also FDIC v. Cardona*, 723 F.2d 132, 134 (1st Cir. 1983); *FDIC v. Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988); *Dawson*, 4 F.3d at 1309; *FDIC v. Rogier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993).

In *Guaranty Trust Co.*, the United States acquired a claim for funds on deposit with the Guaranty Trust Company from the government of the Union of Soviet Socialist Republics as part of a treaty recognizing that government. Guaranty Trust argued that it could retain the funds because the New York statute of limitations had run against the Soviet government. The United States, on the other hand, argued that its position as sovereign barred the operation of the New York statute.

This Court rejected the Government's equitable arguments, reasoning that because the statute of limitations had already run against the Soviet government, "[t]he United States never acquired a right free of pre-existing infirmity." *Id.* at 304 U.S. at 141-42, 58 S.Ct. at 793. Thus the statute of limitations did not deprive the United States of any right. *Id.* Furthermore, regardless of the Government's equitable position, public policy did not forbid "the running of limitations against its assignor." *Id.*

In this case, just as in *Guaranty Trust Co.*, the FDIC has not been deprived of any right because it "never acquired a right free of pre-existing infirmity." Furthermore, just as in *Guaranty Trust Co.*, public policy did not

forbid the running of the Texas statute against TIB before the FDIC acquired the claim. Thus the FDIC cannot rely on its position as receiver with regard to pre-receivership events. *See also Dawson*, 4 F.3d at 1309 ("there is no justification for applying federal equitable tolling principles to pre-receivership events").

In *Austrian*, the Second Circuit considered whether a federal court must apply a state statute of limitations in the same manner as the state courts when a trustee in bankruptcy asserts the claim. 198 F.2d at 699. The district court, rather than following state tolling principles, applied a federal equitable rule, the equivalent of adverse domination, that tolled the statute during the time that the party who committed the fraud concealed the wrongdoing. *Id.* 700.

The Second Circuit reversed, holding that the "clear mandate to apply the state limitations statute in a case like this includes its application in the manner established by other relevant provisions of state law, and state court interpretations of state law." *Id.* at 701 (citations omitted). The *Austrian* court distinguished this Court's decision in *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 583 (1946), which considered equitable tolling principles in the context of a borrowed statute of limitations. *Id.* (citing to *Holmberg*). *Holmberg* did not require a different result, the court reasoned, because "the state statue of limitations was being applied [in *Holmberg*] to a federally created cause of action while here the cause of action is state created." *Id.* These cases, which the FDIC fails to discuss, establish that state tolling law governs the viability of state law claims.

B. No Conflict Exists With The Tenth Circuit's Opinion In *Bryan*.

Contrary to the FDIC's assertions, a conflict in the circuits does not exist on whether a federal court must consider state tolling law when deciding whether a state law cause of action expired under a state statute of limitations. In fact, the circuits uniformly have held that state tolling principles apply when the FDIC asserts state law claims. *Dawson*, 4 F.3d at 1308; *FDIC v. Cocke*, 7 F.3d 396, 399 (4th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1483); *Resolution Trust Corp. v. Seale*, 13 F.3d 850 (5th Cir. 1994) (following *Dawson*); *FDIC v. Consolidated Mortgage Finance Corp.*, 805 F.2d 14, 18 (1st Cir. 1986); *Resolution Trust Corp. v. Everhart*, 837 F.Supp. 155 (E.D.Va. 1993) (following *Cocke*).

In alleging a conflict, the FDIC relies solely on *Farmers & Merchants National Bank v. Bryan*, a case that solely involved federal statutory causes of action. 902 F.2d 1520 (10th Cir. 1990). The *Bryan* court did not consider the application of federal tolling principles to state law claims. Rather, the court "borrowed" a state statute of limitations because Congress prescribed no federal statute of limitations for the violations of the National Banking Act, 12 U.S.C. §§ 84, 93, at issue in that case. The district court in this case, however, did not "borrow" a state statute of limitations when it applied the Texas statute to a Texas claim. *See, e.g., Dawson*, 4 F.3d at 1309 (federal courts do not "borrow" state statute of limitations when the FDIC asserts a state law claim in its role as receiver of a failed bank).

The *Bryan* court's decision to consult federal tolling principles when enforcing a federal statutory cause of

action does not conflict with the Fifth Circuit's decision to consult state tolling principles when enforcing a state law claim. Furthermore, as the Seventh Circuit noted in *Smith v. City of Chicago Heights*, 951 F.2d 834 (7th Cir. 1992), the Tenth Circuit's decision in *Bryan* is of questionable validity in light of recent precedent from this Court holding that state tolling law is the "primary guide" when "borrowing" a state statute of limitations. *Id.* at 839 ("*Johnson* and subsequent cases have held that, when a federal court borrows a state statute of limitations, it should borrow any applicable state tolling provision as well") (citing *Johnson v. Ry. Express Agency*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722 (1975)). Under these cases, a federal court may disregard the state tolling law only if it is inconsistent with federal policy. *See also Board of Regents v. Tomanio*, 446 U.S. 478, 485-86, 100 S.Ct. 1790, 1995-96 (1980). Thus "[t]he *Bryan* court . . . misread the current law regarding the proper source of tolling rules for federal courts that borrow a state statute of limitations." *Dawson*, 4 F.3d at 1309.

Furthermore, the policy considerations that caused this Court to decide that state tolling law should be the primary guide when "borrowing" a state statute of limitations apply with far greater force when the court applies a state statute of limitations to a state law claim. As this Court explained in *Johnson*, a state statute of limitations cannot be understood without considering "the context of the various circumstances that suspend it from running against a particular cause of action." 421 U.S. at 463-64, 95 S.Ct. at 1722. In such cases, the federal court relies not only on the state's wisdom in setting limits, but on its judgment in providing exceptions to

those limits. *Johnson*, 421 U.S. at 463-64, 95 S.Ct. at 1722. In short, the Tenth Circuit's decision in *Bryan* does not conflict with the Fifth Circuit's decision in *Dawson*, and is not authority for the FDIC's contention that federal tolling principles should apply to state law claims.

C. A Federal Common Law Rule Is Inappropriate When Enforcing A State Law Claim.

The FDIC asks this Court to create a special rule requiring the application of federal tolling principles to state law claims. In arguing for this special rule, the FDIC relies on *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979). That reliance is misplaced.

In *Kimbell Foods*, this Court decided not to adopt a federal common law rule on the priority of "contractual liens arising from certain federal loan programs . . . , in the absence of a federal statute setting priorities." *Id.* 440 U.S. at 718, 995 S. Ct. at 1453. In reaching that conclusion, this Court prescribed a two-prong test for determining whether to frame a federal common law rule. First, the court must "decide whether federal or state law governs the controversies." Only "if federal law applies" does the court balance the competing interests in order to determine "whether this Court should fashion a uniform . . . rule or incorporate state . . . law." *Id.* The FDIC in this case does not meet the first prong of *Kimbell Foods* test because state law applies to the claim. Thus the balancing test under *Kimbell Foods* is never reached.

Furthermore, unlike *Kimbell Foods*, the FDIC is not asking this Court to decide whether to fill the interstices in an extensive program of federal regulation by relying

on state law or by establishing a uniform federal common law rule. Rather, the FDIC asserts a cause of action that derives entirely from state law. Indeed, if it were not for Texas law, the FDIC would have no claim. *See FDIC v. Cocke*, 7 F.3d 396, 399 (4th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1483).

In support of its request for a federal common law rule, the FDIC urges a need for uniformity. Congress, however, did not choose to create a uniform federal law, but enabled the FDIC, as receiver for a failed bank, to bring whatever state law claims that the bank owned when the FDIC acquired the failed institution's assets.[4] As this Court explained in *Robertson v. Wegmann* "[t]his statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 436 U.S. 584, 594 n.11, 98 S.Ct. 1991, 1997 n.11 (1978).

Congress, moreover, in making state statutes of limitations applicable to these claims, relied on the state's wisdom in setting limitations and exceptions to limitations. *Johnson*, 421 U.S. at 463-64, 95 S.Ct. at 1722 (a state statute of limitations cannot be understood absent "the context of the various circumstances that suspend it from running against a particular cause of action"). Indeed, state statutes of limitation are expressions of important

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[4] Similar arguments by the FDIC based on uniformity have not succeeded in other cases. *See, e.g., FDIC v. American Cas. Co.*, 995 F.2d 471 (5th Cir. 1993), *citing Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *FDIC v. American Cas. Co.*, 975 F.2d 677 (10th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695 (8th Cir. 1992); *American Cas. Co. v. FDIC*, 944 F.2d 455 (8th Cir. 1991).

legislative policies that should not be abrogated lightly, especially when the statute is being applied to a state law cause of action. *Dawson*, 4 F.3d at 1311-12 (citing *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). *See also Resolution Trust Corp. v. Seale*, 13 F.3d 850, 852 (5th Cir. 1994).

The FDIC nevertheless argues that it should not have to consider whether its claims expired "on a state-by-state basis." The FDIC, however, cannot escape examining state substantive law and statutes of limitations "on a state-by-state basis" when asserting state law causes of action. *See, e.g., Austrian*, 198 F.2d at 702 ("there can be no escape from the diverse periods of limitations set up in the various state statutes"). In these circumstances, the FDIC is not unduly burdened by examining the manner in which the state applies its statute of limitations to state law claims. Furthermore, the decision whether to apply an equitable doctrine is always a fact-intensive inquiry that necessarily requires case-by-case consideration. *See, e.g., Bryan* 902 F.2d at 1523 ("the relevant inquiry is inherently fact-specific").

According to the FDIC, this Court should frame a federal rule "that takes into account the special responsibilities of the officers and directors of federally insured institutions, [and] the role of the FDIC as receiver and guardian of the federal insurance fund." Congress undoubtedly took those interests into consideration when it chose to preserve the state's interest in the application of its own law to institutions and activities within the state's jurisdiction. *See, e.g., Austrian*, 198 F.2d at 702 (Congress intended to give effect to the "repose policy of

the state limitations periods . . . in the manner in which the various states saw fit to make this policy effective.").

In addition, the FDIC contends that state tolling law conflicts with the federal interest in winning suits against former officers and directors of failed institutions and thus adding to the federal coffers. That argument, however, could be made with regard to any state law unfavorable to the FDIC's position. State law does not become inapplicable merely because the FDIC may lose some of its cases. As one court explained, "there is nothing [in FIRREA] to indicate a Congressional policy that would justify the federal courts' applying a special rule 'trumping' state precedent for the benefit of the RTC." *RTC v. Hecht*, 833 F.Supp. 529, 531 (D.Md. 1993).

D. The Equitable Principles At Issue In O'Melveny Have No Application To This Case.

According to the FDIC, the Court should hold this petition until it decides *O'Melveny & Myers v. FDIC, cert. granted*, No. 93-489 (Nov. 29, 1993). The Court's disposition of *O'Melveny*, however, is unlikely to shed light on the proper analysis to be used in deciding this case.

The defendants in *O'Melveny* attempted to impute the bank's inequitable conduct to the FDIC as receiver. In rejecting this argument, the Ninth Circuit observed that equitable defenses that apply to the bank when it asserts a claim on its own behalf may not apply to the FDIC in its role as receiver of the failed bank's assets. The FDIC in this case, however, never acquired a claim free of infirmities, and cannot assert equities that apply to its role as receiver. *See, e.g., Guaranty Trust Co. v. United States*, 304

U.S. 126, 58 S.Ct. 785 (1938) (United States could not assert its equitable position as sovereign because it never acquired a claim free of infirmities). *See also Dawson*, 4 F.3d at 1309 ("there is no justification for applying federal equitable tolling principles to pre-receivership events"). Nor does this case involve an attempt to impute inequitable conduct to the FDIC. Thus this court's decision in *O'Melveny* is unlikely to affect the well-established principle that state law determines the viability of a state law claim under a state statute of limitations.

CONCLUSION

The Fifth Circuit in this case merely applied state law to a state law claim as required under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464 (1938). The Tenth Circuit's opinion in *Farmers & Merchants Nat. Bank v. Bryan*, which concerned the application of a state statute of limitations to federal statutory causes of action, does not conflict with that decision. Because a split in the circuits does not exist, and because this Court has ruled on the controlling principles, Respondent Kirk K. Weaver respectfully requests that this Court deny the Federal Deposit Insurance Corporation's petition for writ of

certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

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April 24, 1990

Mr. Bill Ogden
Liddell Sapp, Zively, Hill
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Houston, Texas 77002

RE: Federal Deposit Insurance Corporation, Receiver of Texas Investment Bank, N.A. v. Rockleigh S. Dawson, Jr.; Kirk K. Weaver; Michael D. Maloy; and Wayne C. Desselle; In the United States District Court for the Southern District of Texas, Houston Division

Dear Mr. Ogden:

I understand from our telephone conference of April 20, 1990 that you will be representing Mr. Kirk Weaver in the above reference matter. **In response to you [sic] inquiry as to why Mr. Weaver was included as one of the defendants, please be advised that it is our information that Mr. Weaver served as a member of the loan committee and approved the loans which are the subject**

of the complaint without collateral or proper document, and despite the fact that the debtors were already in financial trouble.

This will also confirm that you have until May 18, 1990 to file an answer on behalf of Mr. Weaver.

Very truly yours,

/s/ Walter Clay Cooke by sc
Walter Clay Cooke

WCC/sl
cc: Frank Doremus
Wyman Elrod
Walt Mizell

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for Texas Investment Bank, N.A.,	§	
Plaintiff	§	CIVIL ACTION
	§	NO. H-90-1120
VS.	§	
ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER, MICHAEL D. MALOY AND WAYNE C. DESSELLE,	§	
Defendants	§	

RESPONSE OF PLAINTIFF TO INTERROGATORIES OF DEFENDANT KIRK K. WEAVER

COMES NOW, Plaintiff Federal Deposit Insurance Corporation, Receiver for Texas Investment Bank, N.A. ("Receiver") and responds to the interrogatories of Defendant Kirk K. Weaver.

* * *

INTERROGATORY NO. 16:

Describe in detail the good faith investigation made by the Federal Deposit Insurance Corporation ("FDIC") prior to naming Kirk Weaver as a defendant in this lawsuit and state each and every fact and identify, in compliance with Instruction H(3) above, each and every document discovered by the FDIC supporting a good faith belief that Kirk Weaver:

(a) was a member of the Loan Committee referred to in paragraph 9 of the Amended Complaint;
(b) violated a duty of care to TIB.

RESPONSE: FDIC's investigation into the conduct of the officers and directors of TIB, including Weaver, began when TIB was closed on May 27, 1987. An FDIC investigation team led by Wyman Elrod was part of the FDIC closing team which entered TIB on May 27, 1987, immediately after the Comptroller of the Currency closed TIB. The investigation team interviewed officers and employees, inventoried and gathered bank documents, inventoried all desks, reviewed all criminal referrals, located and reviewed all bonds and director and officer liability policies, interviewed the OCC examiner in charge of the closing, read the minutes of the meetings of the board of directors for the preceding seven years, obtained copies of OCC examination reports, and began preparation of director profiles. A director profile indicates when the person served as a director, the board meetings the director attended, and the person's service on committees. From the investigation team's review of the minutes of the board meetings, they determined that Weaver was a member of the Executive and Loan Committee. Following the closing, the investigation team obtained asset searches on certain officers and directors, and reviewed the bond claim which was pending when TIB was closed. The minutes of the April 28, 1981 meeting of the board of TIB indicate Weaver was elected to the Loan and Discount Committee, and the minutes of the November 18, 1986 meeting of the board of TIB indicate the board approved an update of the TIB loan policy to

reflect that Weaver was a member of the Executive and Loan Committee and the Loan Committee. Evidence of Weaver's violation of his duty to TIB were found in the following documents:

(i) OCC Examination Report dated 6/29/84 and its cover letter from Stephen R. Steinbrink

(ii) OCC Examination Report dated 6/30/86

(iii) OCC Examination Report dated 1/31/85

(iv) OCC Examination Report dated 4/28/87

Watkins' affidavit contains additional evidence of FDIC's continued investigation into Weaver's conduct which clearly supports FDIC's good faith belief that Weaver violated a duty of care to TIB. **As the Receiver has admitted, it was incorrect in its original conclusion that Weaver was a member of the Loan Committee** at the time Desselle was engaged in his unsafe and unsound lending practices. However, Weaver was a member of

TIB's board of directors, and did violate his fiduciary and contractual duties to TIB as a board member.

Respectfully submitted,

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Farmers & Merchants National Bank, Hennessey, Oklahoma,	)	CASE NO. 88-2845
Plaintiff - Appellee,	)	
vs.	)	
BRUCE A. BRYAN and ROBERT BRYAN,	)	
Defendants - Appellants.	)	

BRIEF OF APPELLANTS

(Filed Mar. 13, 1989)

APPEAL FROM THE UNITED
STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-85-1627-R

THE HONORABLE DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

WILLIAM C. McALISTER
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Attorneys for Appellants

* * *

ARGUMENT AND AUTHORITIES

PLAINTIFF, FDIC, FAILED TO PUT ON ANY EVIDENCE THAT STATUTE OF LIMITATIONS WAS TOLLED ON THE BASIS OF DOMINATION OF CONTROL AND THE COURT ERRED IN FAILING TO SUSTAIN THE MOTION FOR DIRECTED VERDICT FOR ALL CLAIMS BARRED BY THE STATUTE OF LIMITATIONS.

The applicable standard of review by this Court for this issue is a consideration of the adequacy or sufficiency of the evidence to support the position of the FDIC that the statute of limitations was tolled because the Bank was dominated by the officers charged.

This proceeding was initiated June 21, 1985. The defense was raised that all portions of claims arising from loans made more than three (3) years prior to such date were barred by the running of the applicable statute of limitations. It was contended on behalf of the FDIC that the statute of limitations was tolled under the adverse domination theory as to all claims by reason of Bruce A. Bryan having maintained the controlling interest in the Bank.

At the close of the evidence, counsel for the Defendants moved for a directed verdict based upon a contention that the FDIC had failed to introduce any evidence to support the adverse domination theory. The Court overruled the Motion for Directed Verdict in favor of the Defendants opining that the question of adverse domination would be a question of fact for the jury stating that he did not think there were sufficient facts either way to direct a verdict in favor of either the Plaintiff or the Defendants on such issue. (Tr. 5-24-88 at 49 and 50).

The claims for relief were based upon alleged violations of Federal Banking Statutes. 12 U.S.C. §§84 and 93. The applicable statute of limitations for such claims would fall under Oklahoma law. *Hughes vs. Reed,* 46 F.2d 435 (10th Cir. 1931). An action upon a liability created by statute must be brought within three (3) years after a claim accrues. 12 Oklahoma Statutes 1981 §95 Second. The claims based upon alleged improper loan activities accrued when the loans were funded. *Corsicana National Bank vs. Johnson,* 251 U.S. 68, 40 S.Ct. 82, 64 L.Ed. 141 (1919); *Hughes vs. Reed,* supra.

The evidence disclosed that at all times, there were members of the Board of Directors who were minority stockholders and not employed as officers of Farmers and Merchants National Bank, Hennessey, Oklahoma (the "Bank"). Among the outside director stockholders were Mr. Ronald Staggs who owned eight percent (8%) of the stock and Judge Robert Lovell who owned two percent (2%) of the stock. (Tr. 5-16-88 at 70 and 72). At the Board of Directors' meetings, there was free discussion of all loans and all issues confronting the Bank. (Tr. 5-18-88 afternoon session at 73 and 74). The loan committee included outside director, Judge Robert Lovell (Tr. 5-18-88 afternoon session at 84).

Judge Lovell and Mr. Staggs, the outside directors, questioned the officers concerning matters and criticisms in the bank examination reports. (Tr. 5-18-88 afternoon session at 100). Marjorie Bryan testified that the outside directors were there to find out about the activities of the loan officers. They had the opportunity to say whatever they wanted (Tr. 5-20-88 at 118).

Evidence was submitted that on occasion, the regional administrator for national banks had arranged to meet with the full Board of Directors concerning perceived problems of the Bank (Plaintiff's Exhibits 76 and 97).

When a statutory bar of limitations is properly invoked, the burden devolves upon the party seeking to avoid its effect to show the facts or acts which operate to toll the limitation. *Beatty vs. Scott,* 362 P.2d 699 (Okl. 1961). When the record discloses that such a burden is not met, a judgment based upon an action barred by limitation cannot stand. *H. F. Wilcox Oil & Gas Co. vs. Diffie,* 186 F.2d 683 (10th Cir. 1950).

A party seeking the benefit of rules in avoidance of the statute of limitations has the burden of proof to establish them. All presumptions are against such party, since the claim to exemption is against the current of the law and is founded on exceptions. *Akron Presform Mold Company vs. McNeil Corporation,* 496 F.2d 230 (6th Cir. 1974) cert. den. 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed. 2d 270 (1979). In the instant case, such burden of proof was not met. In the absence of proof of domination, it must be presumed that it did not exist.

In the case of *Wills vs. Black and West, Architects,* 344 P.2d 581 (Okl. 1959), it was concluded that the evidence was insufficient to submit to the jury the question of whether the statute of limitations had been tolled and where there is no evidence showing cause for tolling the statute, that the question of limitations is not one for the jury and the trial court should be affirmed where it sustains a demur to the evidence.

A Plaintiff who seeks to toll the statute of limitations on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *International Railways of Central America vs. United Fruit Company,* 373 F.2d 408 (2nd Cir. 1967) cert. den. 387 U.S. 921, 87 S.Ct. 2031, 18 L.Ed. 2d 975. In the case of *Moserian vs. Peat, Marwick, Mitchell & Co.,* 727 F.2d 873 (9th Cir. 1984) cert. den. 429 U.S. 931, 105 S.Ct. 329, 83 L.Ed. 2d 265, the District Court directed a verdict on all claims arising prior to the applicable statute of limitations having found no evidence on domination. In affirming such treatment, the Appellate Court stated they did not find any mention of domination or any facts from which domination could be reasonably inferred. It is submitted that in the instant case, the Court should have directed a verdict in favor of the Defendants dismissing all claims pertaining to loans funded prior to June 21, 1982, for the reason that there was no evidence submitted to establish that domination occurred.

THE COURT IMPROPERLY ADMITTED BANK EXAMINATION REPORTS AND ACCOMPANYING TRANSMITTAL LETTERS INTO EVIDENCE.

* * *

appears to compound the evidentiary problems. The Court should set aside the Judgment as it pertains to the claims or counts which are not barred by the applicable statute of limitations and remand such issues for a new trial.

Oral argument is desired on behalf of the Appellants. Oral argument would possibly assist the Court due to the

existence of relatively novel questions involved in a complex case.

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Attorneys for Defendants/
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Robert Bryan

CERTIFICATE OF MAILING

This is to certify that on the 10th day of March, 1989, a true and correct copy of the above and foregoing instrument was mailed to Messrs. David L. Bryant, Gene C. Buzzard and James W. Rusher, of the firm Gable & Gotwals, 20th Floor, Fourth National Building, Tulsa, Oklahoma 74119, attorneys for Federal Deposit Insurance Corporation, as Receiver, with postage fully prepaid.

/s/ William C. McAlister

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-2845

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of Farmers & Merchants
National Bank, Hennessey, Oklahoma

Plaintiff-Appellee,

v.

BRUCE A. BRYAN and ROBERT BRYAN,

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Oklahoma
Case No. CIV-85-1627-R
Honorable David L. Russell, United States District Judge

ANSWER BRIEF OF APPELLEE

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* * *

view the evidence in the light most favorable to the Plaintiff and give it the benefit of all reasonable inferences that could be drawn from the evidence. *Zimmerman v. First Federal Savings & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988); *Mackey v. Burke*, 751 F.2d 322, 324 (10th Cir. 1984); *Ford Motor Credit Co. v. Milburn*, 615 F.2d 892, 894 (10th Cir. 1980); *Kiner v. Northcutt*, 424 F.2d 222, 223 (10th Cir. 1970) (reversing a directed verdict in favor of plaintiff in a negligence action, noting that a directed verdict is justified "only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion").

Because the application of these rules is "always perplexing and necessarily subject to the human equation," *High Voltage Engineering Corp. v. Pierce*, 359 F.2d 33, 38 (10th Cir. 1966), this Court has said "we will not superimpose our second-hand judgment on the trial court unless we can say from our objective appraisal of all of the facts and circumstances that his judgment was clearly wrong," *Chicago, Rock Island and Pac. R. Co. v. Howell*, 401 F.2d 752, 755 (10th Cir. 1968) (*citing High Voltage*).

A. Plaintiff's Claims are Governed by a Three-Year Limitations Period.

In its January 12, 1988 order denying the Defendants' motion for partial summary judgment the trial court, citing *Hughes v. Reed*, 46 F.2d 435, 440-41 (10th Cir. 1931), held (Doc. 86 at 2) that **there is no federal statute of limitations applicable to the FDIC's federal law claims** and that the FDIC's claims are therefore governed by a borrowed state statute of limitations, namely 12 Okla.

Stat. §95 (Second), which creates a three-year limitations period for any "action upon a contract express or implied not in writing" and for any "action upon a liability created by statute other than a forfeiture or penalty."[1]

The Defendants contend that the Plaintiff's claims accrued, and the limitations period began to run, on the date each illegal or imprudent loan was made. They also contend that the statute of limitations ran continuously on all claims, from the dates the loan transactions occurred. Consequently, the Defendants argue that any claim based on a loan made before June 21, 1982 was barred by limitations when the Bank filed this action on June 21, 1985.

Because of the application of the "adverse domination" theory of tolling, discussed below, the statute had not run on any claim included in the action the Bank filed on June 21, 1985. This is the case because the Defendants' adverse domination of the Bank began no later than September 19, 1977, when Bruce Bryan bought a controlling interest in the Bank, and ended no earlier than June 21, 1984, when Bruce Bryan sold his controlling interest. Accordingly, when the domination period ended on June 21, 1984 (at the earliest), the statute even on loans made as early as July 1, 1976 (the earliest loan in question)

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[1] The Receiver's claims may actually be governed by 28 U.S.C. §2415(a), which specifies a six-year limitations period for every action for money damages which is brought by a federal agency and which is "founded upon any contract express or implied in law or fact." The Oklahoma statute which the Tenth Circuit applied in *Hughes v. Reed* is the counterpart of 28 U.S.C. §2415(a). However, 28 U.S.C. §2415(a) did not exist at the time *Hughes v. Reed* was decided.

could not have been running for more than 15 months, and when the Bank filed suit on June 21, 1985, the statute could not have been running for more than 27 months, because it was tolled while the Defendants controlled the Bank.

B. "Adverse Domination" Tolls a Statute of Limitations on Claims Against the Culpable Directors and Officers of a Bank.

Under the doctrine of "adverse domination" claims against bank or other corporate directors and officers for breaches of their duties do not necessarily accrue at the time the breaches occur, *i.e.*, at the time illegal or imprudent loans are made and approved. If culpable directors and officers are in control of the institution when the breaches of duty occur, the claims do not accrue, and any applicable limitations period does not begin to run, until the culpable directors and officers relinquish control. *See, e.g., Michelsen v. Penney,* 135 F.2d 409 (2nd Cir. 1943); *Adams v. Clarke,* 22 F.2d 957 (9th Cir. 1927); *FDIC v. Hudson,* 673 F. Supp. 1039 (D. Kan. 1987); *FDIC v. Dempster,* 637 F. Supp. 362 (E.D. Tenn. 1986); *FSLIC v. Williams,* 599 F. Supp. 1184 (D. Md. 1984); *FDIC v. Buttram,* 590 F. Supp. 251 (N.D. Ala. 1984); *FDIC v. Bird,* 516 F. Supp. 647 (D. P.R. 1981). This rule has strong legal and practical bases.

The adverse domination doctrine is a product of the modern view that a statute of limitations governing claims against corporate directors and officers should be tolled as long as the culpable directors control the corporation so as to effectively prevent it from bringing suit on

its claims. *See* 3A *Fletcher's Encyclopedia of Corporations* §1306.2 (1975); W. E. Knepper & D. Bailey, *Liability of Corporate Officers and Directors* at 355 (3rd ed. 1988). The doctrine serves the interests of the injured entity, and prevents the wrongdoers from profiting from their own practical influence over the timing of a suit brought against them.

In its order denying the Defendants' motion for partial summary judgment, the trial court adopted the adverse domination theory of tolling, saying:

> "The Court finds the logic of the 'adverse domination doctrine' compelling and adopts it as federal common law for purposes of determining when **the federal claims made actionable under 12 U.S.C. § 93** accrued and when the borrowed state statute of limitations applicable thereto begin [sic] to run.
>
> *Hughes v. Reed* is not contrary; in that case the adverse domination doctrine was not raised nor specifically addressed by the Tenth Circuit. To the extent that the Tenth Circuit's focus upon active concealment as an 'exception' to the state statute of limitations, *see* 46 F.2d at 441, implies that that is the only 'exception' or tolling doctrine recognized by the Tenth Circuit, this Court is of the opinion that the Tenth Circuit would not now adopt such a view but would find the substantial contemporary authority recognizing adverse domination as a federal tolling doctrine persuasive." (Doc. 86 at 3).

We submit that the trial court was correct.

* * *

Respectfully submitted,

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